RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM 1979

NO. 79-6646

LYLE H. PRENZLER,

Plaintiff, Appellant,

vs.

HOMER REED,

Defendant, Appellee ,

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Lyle H. Prenzler, hereby motions to proceed in Forma Pauperis and supports said motion under 28 U.S.C. 1915, especially 1915(d) for appointment of counsel to aid in procedural process, by attached affidavit.

Dated: May 6 1980

LYLE H. PRENZLER
715 East Chapman Avenue
Orange, California 92666
714 639 1701

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NO. 79-6646

LYLE H. PRENZLER, appellant,

vs.

HOMER REED,

appellee,

AFFIDAVIT Rule 53

IN SUPORT MOTION FORMA PAUPERIS

STATE CALIFORNIA)
) SS.
C UNTY ORANGE)

I, Lyle H. Prenzler, beino duly sworn, depose and say:

I am the appellant in the above entitled cause, and support my applic ation for leave to proceed without beino required to prepay costs or fees, state:

1. I am a pauper, in part, because of the act ion herein, and need appointment of counsel to support the procedural requirements of said appeal.

2. I believe I am entitled to redress;

3. The nature of the cause, in brief, is a denial of injunctive rel ef to combine actions, that are numerous and multiply vexatious, and e ch expo entially denying my possibility of obt ining redress by a class of adverse p rties of co-conspirators and each obt ining judgments for the same cause and same re and res; and by denial of due process and discrimina tion by direct evidence by Courts of this United States and against Acts of Congress including 15 U.S.C. 77, 1, 15, et al.,

NOTARY PUBLIC MY COMMISSION EXPIRES 10-3-1980

May 6 - 1980

Dorothy M. Banta

OFFICIAL SEAL
DOROTHY M. BANTA
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
ORANGE COUNTY
My Commission Expires October 3, 1980

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OCTOBER TERM 1979

No. 79-6646

LYLE H. PRENZLER,

Plaintiff, Appellant,

vs.

HOMER REED,

Defendant, Appellee.

JURISDICTIONAL STATEMENT

RULE 15

OPINIONS BELOW

Appellant, Lyle H. Prenzler, filed this Complaint on April 16, 1979 in the Superior Court of Orange County California as 311252, alleging misrepresentation and seeking restitution which had been denied redress as Case No. 292061, as a counter-claim to a Sister State Money-Judgment by Order of Robert C. Todd, Judge of the same Court presiding; in December 8, 1978; while this same Case 292061 had been removed to the U.S. District Court for Central California (Appended 1). Service of Process on Mr. Reed by Certified and Registered Mail in Pennaylvania CCP415.40 (Appended 2). A Request to Enter Judgment on Affidavit was filed on July 22, 1979 (Appended 3). Without notification of Appellant a Judgment of Dismissal and granting Motion to set aside default was granted (Appended 4&5), of Hearing September 20, 1979. On October 25, 1979, the same Honorable Robert C. Todd, denied plaintiff's Motion to Set Aside Judgment (Appended 6). ON February 13, 1980, a Petition to set aside order of dismissal petition for relief from default, and request for extension of time to file designation of record on appeal were Denied.(Appended 7). This appeal is from the denial of Petition for Hearing by the Supreme Court of the State of California with Notice of Appeal to the Supreme Court of the United States of the Court of Appeals Fourth District No. 21868 dated April 28, 1980. (Appended 8).

On September 2', 1979, a Notice of Dismissal of Appeal No. 292061, was filed by appellee. (Appended 9).

JURISDICTION

Notice of Unilateral rescission has been made, and restitution sought in view of destruction of the rem; that is, citrus ranches in Arizona for which a deficiency judgment in Yuma Arizona was sued on in California by assignees of assignor Reed and Cross-Complaint seeking Restitution dismissed on December 8, 1978 in ancillary suit 292061. This new and independent action sought to obtain jurisdiction of Reed which had been denied under Cal.Cod. Civ. Proc. 418.10, 413.10, 415.10 for failure to serve summons with Complaint although attested to by serving officer on original summons pursuant to Cal.Cod. Civ. Proc. 417.30; California Code Para. 1691:

> "the service of a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both".

It is believed by appellant, having not been served with Motion to Dismiss and Set Aside Default of September 20, 1979; that such Motion and Judgment was based on Cal. Cod. Civ. Proc. 418.10(d)

> "No default may be entered against the defendant before the expiration of his time to plead and no motion under this section shall be deemed a general appearance by the defendant".

The defendant was in default at the time and statute had run allowing removal to District Court under 28 U.S.C. 1441(b),1446(b), in which process Service is statutorily permitted as Article 3 Section U.S.Constitution, 28 U;S.C. 1447(a); also as an action under Rule 22 (1) Federal Rules of Civil Procedure and Federal Interpleader Act where there are multiple adverse claims; Williams v. Gilmore (1942) 51 CA2d 084; ancillary jurisdiction brought in district where appellant sued in Case No. 292061; against a class of co-conspirators of whom appelle was one,to deny appellant of equal protection of laws 28 U.S.C. 1397, 2361, 1335, 1343(1,2,3); 42 U.S.C. 1983, 1985 and 15 U.S.C. 77, under color of state law of right secured by U.S. Constitution.

The statutory provisions believed to confer on this court jurisdiciton of this appeal are Title 28 U.S.C. 2101(c), 2103, 2104, 1257(2); and there has been within abuse and excess of discretion of the courts by vacating judgments, refusing to consolidate and amend pleadings.

The cases believed to sustain the jurisdiction are:

(1) Commonwealth of Pennsylvania vs. Western Union Telegraph Co. (1961) 368 U.S. 71.

(2) Williams v. Gilmore (1942) 51 CA2d 684;

(3) Carrasco v. Klein (1974) DC NY) 381 F.Supp. 782;

(4) White v. Matthews (1976)(DCSD) 420 F.Supp. 882;

(5) DeKalb County v Southern Bell Tel. & Tel.Co. (1972 DC Ga) 358 F.Supp.

(6) Earnhart v. Heath (1974 DC Ark) 369 F.Supp. 259.

The validity of state statute 413.10, 415.10, 418.10 are appended as involved. Copy of opinions and Judgments appended. also CCP 428.10-50 QUESTIONS PRESENTED

1. Whether the trial court in ruling that it had no jurisdiction to review the Motion to set aside default did not conform to decision in December 1978 in case ancillary; that it had jurisdiction while case removed and on appeal?
2. Whether the order granting motion to set aside a default was made before judgment and therefore non-appealable? 84 CA2d 815.
3. Whether the denial of personal jurisdiction by the trial court was based on Cal.Cod. Civ. Proc. 413.10,415.10,418.10 for lack of service of summons with complaint; while service was by mail pursuant to Cal.Cod.Civ.Proc. 415.40 in this action; in error?
4. Whether the denial of personal jurisdiction in setting aside default for lack of general appearance pursuant to Cal.Cod. Civ. Proc. done under color state statute 418.10; is repugnant to the U.S. Constitution as a denial of equal protection and due process; denying appellant redress or any hope of redress when prior ancillary proceedings in Arizona begun in state courts and removed improvidentially pursuant to 28 U.S.C. 1447 without jurisdiction as no diversity of citizenship as 28 U.S.C. 1332

for doing business in California; and this appellant caused to have jurisdiction by conspiracy of attorneys to appear as defendant in Arizona; as non-citizen and non resident Article 4 Sec 2 U.S.Constitution and thus discriminated and further denied equal jurisdiction of this appellee in California for lack of personal jurisdiction on bases of failure to serve summons with complaint which had been attested to under affidavit by serving officer as having been served on appellee and broker for transaction in real estate which is cause of these suits; (Carrasco v Klein) and is this affidavit false; and this action is in the nature of a set-off against multiple claims, adverse to each other, in nature of interpleader causing multiple vexations aginst appellant and discriminating by increasing his jeopardy by losing one of multiple actions would forever cause adverse res judicata effect or in case of one weak dismissal without notification as herein which might be and has been used as a decision appellant; and further denying general appearance to appear to set aside default?

5. Whether this set-off to seek restitution on a transaction of $160,000 against the appellee as assignor of note brought for deficiency judgment in California by assignees as ancillary proceeding (292061) estops denial of personal jurisdiction of appellee as assignor in California; and denial of redress of counterclaim as assignees in (292061) by Order of the trial judge who has acted under color state statutes 418.10 Cal.Cod.Civ.Proc; as a co-conspirator in class of co-conspirators to deny equal protection to appellant?

6. Whether the herein restitution as a set-off, or in nature of a set- off of $160,000 for total price of real estate transaction on which ancillary judgments on same liabilities and same elements have been had for $500000, triplinn damages in error as a fraud upon the court; aginst appellant; for denial of interpleader; consolidation; vacation judgments; which has involved citings for contempt or threats of contempt for failure to pay care costs of properties not involved in this transaction and misrepresented by the broker for appellee in sale to me and also in same sale to a Mr. Kleinman who has one of above

judgments and assignees for another of the judgments and multiple claims on same transactions are continuing and increasing; and by denial of this set-off or restitution and also in case no 292061 appellant has been denied redress and discriminated against in denial of equal protection of laws to appellant; and inconvenience and discrimination against appellant in Arizona and venue only in this district pursuant to 28 U.S.C. 1391, 2361, 1343, et al.? Is such error nunc pro tunce?

6. Whether the lack of notication of appellant of hearing to set aside default is a denial of due process and repugnant to the U.S. Constitution?

7. Whether ancillary jurisdiction of appellee and venue in California cannot be objected to by assinor as cross-defendant in case no 292061 brought by assignees in California; and this action which is ancillary thereto and brought to seek restitution when justice denied for such jurisdiction and venue in ancillary case no. 292061? Lesnik v. Public Indus. Corp., 144 F2d 968.

8. Whether denial of restitution is denial of equal protection o the laws; having been allowed to plaintiffs in ancillary jurisdiction; and ancillary jurisdiction allows extraordinary advantage of nationwide service and nationwide injunctive relief under Rule 22(1) Federal Rules of Civil Procedure herein which has been denied the appellant conspiratorially by class of co-conspirators under color of state statute?

9. Whether being compelled to relinquish property within the state of Arizona in a st te court's jurisdiction purporting to be based on presence of property within the state, the appe lant has been deprived of due process of law if compell d to relinquish with subsequent bringing of two other judgments by claimants on same liabilty in another jurisdiction who is not bound by the first judgment?

10. Whether the deprivation of personal property and real property in this suit and ancillary suits without trial or hearing is a denaial of due process of law and therefore unconstitutional?

STATEMENT OF THE CASE

This complaint for or in nature of restitution of a real estate

sale in Arizona to appellant by appellee which was resold to a Mr. Kleinman by same broker on which misrepresentation was claimed by Mr. Kleinman on same representations made by the same broker and such by rescission and restitution in ARizona, where a suit for deficiency judgment brought by assinees of note of appellee in California, which was void for lack of considertion and failure to comply with rule 54 Arizona Rules of Court, when served on appellant in California; a counterclaim against assignees by appellant brought with rescission and restitution naming appellee as cross-defendant with broker was dismissed by the same Judge in December 1978 as case No. 202061, while removed and appealed citing lack of personal jurisdiction under Cal. Cod. Civ. Proc. 418.10 of assignor and broker for lack of service summons with complaint although affidavit of such service by serving officer and restitution denied to assignees or assignor and cross-complainant pursuant to 428.10 which concerns compulsory cross-complaint and such decision is appealed; and has been cited in Notice to Court in this action as a res judicata, very weak, or in nature thereof. Appellant has been denied restitution thereby. This suit was defaulted by appellee, no judgment entered; and default set aside without notification of appellant; and dismissing appellee for lack of personal jurisdiction citing 418.10 and 415.10, 413.10 Cal.Cod.Civ.Proc. when service of process by 415.40, by mail; and denying general appearance by appellee by 418.10 Cal.Cod.Civ.Proc. Mtion to set aside and vacate judgment to set aside default denied on bases of lack jurisdiction because appealed, and appeal dismissed without opinion. Multiple actions ancillary to this cause have been denied redress, open hearing, trial, in which three or more judgments have entered, and on appeal, for an amount three times that of the original real estate transaction in which no substantive appearance has been had by appellant in Arizona, in which unauthorized stipulations by the class of co-conspirators to deprive of rights privileges and immunities secured by the Constitutionand laws, obstructing true course of justice which has injured this citizen of the United States and action for recovery of damages and restitution of personal and real property is claimed; and

the co-conspirators had knowledge that such deprivations were about to occur and had power to prevent and district have original jurisdiction to redresss these deprivations and thi ppellant is entitled to venue requirments of the XIV Amendment.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal cites actions by process servers, judges, and state official, and private persons who have joined with them to violate protected rights of this citizen appellant and responsible under civil rights statutes; also for actions under color of cited California and Arizona State Statutes to deprive of constitutional rights and presence of acts or actions which are repugnant to Federal Constitution, acting conspiratorially as co-conspirators as members of a class to injure this appellant in his person or property and deprived of having and exercising any right or privilege of this citizen of the United States; and have so injured and deprived this citizen appellant and an action for damages occasioned by such injury or deprivation against any one or more of the co-conspirators is appropriate. The denial and deprivation also includes denial of interpleading against multiple vexations and all persons making conflicting claims against appellant; consolidations; and in error vacating judgments was an excess of discretion by the courts. Denial of redress, jurisdiction on base and ground of special appearance, venue herein under color st te statute are repugnant to Federal Constitution. This is in the nature of a multi-district litigation and all claimants and adverse parties are not from one state; appellant is from California and claims arose in California.

CONCLUSIONS

For all the above reasons, this case should be reviewed by this Court on its merits.

Respectfully submitted,

Lyle H. Frenzler
715 East Chapman Avenue
Orange, California 92660
714 639 1701

In Propria Persona

May 6, 1980

Chambers of
ROBERT C. TODD
Judge of Superior Court

Superior Courts of the State of California
County of Orange
700 CIVIC CENTER DRIVE WEST
Santa Ana, California 92701

FILED
DEC 8 1978
WILLIAM [illegible], County Clerk
By _____ Deputy

December 7, 1978

(714) 834-3734

Lyle H. Prenzler
715 East Chapman Ave
Orange, CA 92666

Mark S. Raynes
Attorney at Law
Higgs, Fletcher & Mack
1800 Home Tower
707 Broadway
San Diego, CA 92101

Bretz and Hennigan
124 Lasky Drive
Beverly Hills, CA 90212

Alvin J. Ufkes, Esq.
601 E. Chapman Ave.
Orange, CA 92660

ACS 1

Re: Pike vs. Prenzler
Case No. 29 20 61

Gentlemen:

This is a strange file!

On February 8, 1977, plaintiffs (four) obtained a judgment against the defendant in the Superior Court, Yuma County, Arizona.

On June 12, 1978, the plaintiffs obtained a judgment on the sister state judgment, in the Superior Court, Orange County, California (this "case").

On July 11, 1978, defendant moved to vacate the California judgment. That matter was set for hearing on September 15, 1978.

Also, on July 11, 1978, defendant filed (1) "Notice of Rescission of Contract", (2) "Compulsory Cross Complaint . . . . ," and, on July 12, 1978, (3) a "First Ammended (sic) Compulsory Cross Complaint," with a (4) "First Ammended (sic) Notice of Rescission of Contract." Summons, somehow, was issued on the first amended cross complaint.

Cross defendants Homer J. Reed, Fred Kamrath and Vera Kamrath moved to quash summons and service, on non-resident

jurisdictional grounds. Their motions were granted on August 28, 1978, and October 2, 1978. Defendant, on October 16, 1978, filed his notice of appeal of these rulings.

In the meantime, though, plaintiffs (as cross-defendants) demurred to defendant's cross-complaint. The demurrers were sustained on August 31, 1978, defendant being given 30 days in which to amend. Defendant filed a second amended cross-complaint on September 26, 1978. On October 30, 1978, the demurrers of plaintiffs to the second amended complaint were filed. As far as the court can tell, no hearing on these demurrers has ever been noticed, scheduled or held.

Defendant's motion to vacate the California judgment was heard, denied and ruling entered on September 15, 1978.

On October 10, 1978, defendant filed a "Notice of Petition for Removal", defendant stating, in that document, "the within proceedings have been petitioned for removal to the United States District Court for the Central District California." On that matter, the court's file reflects nothing further.

(1) Defendant was served to appear for a judgment debtor examination on November 2, 1978. On that date, the examination was continued to December 6, 1978.

(2) On September 28, 1978, plaintiffs filed a Memorandum of Costs for $2,396.95. On October 2, 1978, defendant filed a notice of motion to tax costs. That matter was set to be heard on November 2, 1978, but was continued to December 6, 1978, for hearing. Concurrently, defendants Motion to Strike the Cost Bill was set for hearing on December 6, 1978.

(3) Cross-defendants Reed and the Kamraths mailed a Memorandum of Costs to the Court on October 18, 1978, costs claimed being $156.57. That memorandum was received by the Court on October 20, 1978. On October 19, 1978, defendant filed notices to tax costs and to strike the cost bills, the matters being set for hearing on November 24, 1978. On November 1, 1978, the cross-defendants filed a "Response to Motion to Tax Costs", in which documents the cross-defendants state that

they "will not oppose Dr. Prenzler's Motion to Tax Costs. For some reason, not reflected in the record, this set of notices was placed off-calendar.

(4) Defendant filed a "Notice of Motion to Continue" on November 24, 1974, for hearing on December 6, 1978. The notice did not state what it was that defendant wanted continued but, from his declaration, it appears that the defendant wanted to continue the judgment debtor examination and further appears that the defendant was requesting the continuance to a time beyond the hearing and trial on his cross-complaint in this court and/or in the United States District Court, District of Arizona.

(5) Defendant, on November 28, 1978, filed a notice of motion for preliminary injunction, permanent injunction, and temporary and permanent restraining orders, these set for hearing on December 6, 1978.

December 6, 1978:

Defendant, accompanied by Alvin J. Ufkes, Esquire (special appearance), and Mark S. Raynes, Esquire, for plaintiffs, appeared and sought continuances of every issue. The Court refused those requests and rules as follows:

(4) The motion of defendant for a continuance is denied, as to all issues.

(1) The judgment debtor examination, after a hearing in chambers (the court reporter not reporting the latter portion of that hearing), was ordered to proceed today.

(3) The motions to tax and to strike the costs of cross-defendants (Kamraths and Reed) are restored to the calendar, on the court's own motion and are granted.

(2) As to the costs claimed by plaintiffs, as stated above, the motion to vacate the judgment was decided, and that decision entered, on September 15, 1978. Defendant

opposes plaintiffs' right to recover those costs on the grounds that Section 1021, Code of Civil Procedure, does not permit recovery of attorneys fees, that Section 1033, Code of Civil Procedure, requires service and filing within ten days after the entry of the Court's decision, and does not permit recovery of the items listed. The cost billed was filed with the Court on September 28, 1978.

For the grounds stated, defendant's motions to tax costs and to strike the cost bills are granted.

(5) Defendant's cross-complaint should not have been accepted for filing in this Court. The summons issued on the cross-complaint should not have been issued. (Sections 428.10, 428.50, Code of Civil Procedure) The cross-complaint was filed after judgment had been entered on the complaint (admittedly, defendant was not in a position to do much about that) and without leave of Court.

The Court has, on its own motion and without notice to the parties, set the hearing on the demurrers to the second amended cross-complaint for December 6, 1978. The court, exercising judicial notice of the court's file, the applicable law, the second amended complaint and the demurrers thereto, sustains the demurrers to all causes of action pleaded without leave to amend.

The net effect of this is to leave defendant to his remedies to the District Court of Appeal, Fourth District, the United States District Court, District of Arizona and, if available for relief, the United States District Court, Central District of California.

Counsel for plaintiff is to prepare, file and serve a formal "Judgment, Order and Ruling" for this Court's signature, embodying all the decisions set forth above.

Very truly yours,

Robert C. Todd
Judge of the Superior Court

RCT:m

b On defendant (Name) HOMER REED

c By serving (1) [X] Defendant (2) [ ] Other (Name and title or relationship to person served)

d [ ] By delivery at [XX] home [ ] business (1) Date of 4-21, 79 April 21, 1979
(2) Time of (3) Address 561 STATE ROAD 885, CLAIRTON PENNSYLVANIA

e [XX] By mailing (1) Date of April 16 1979 (2) Place of Orange, California

2 Manner of service (Check proper box)

a [ ] **Personal service.** By personally delivering copies. (CCP 415.10)

b [ ] **Substituted service on corporation, unincorporated association (including partnership), or public entity.** By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(a))

c [ ] **Substituted service on natural person, minor, incompetent, or candidate.** By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of the office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(b)) **(Attach separate declaration or affidavit stating acts relied on to establish reasonable diligence in first attempting personal service.)**

d [ ] **Mail and acknowledgment service.** By mailing (by first-class mail or airmail) copies to the person served, together with two copies of the form of notice and acknowledgment and a return envelope, postage prepaid, addressed to the sender. (CCP 415.30) **(Attach completed acknowledgment of receipt.)**

e [X] **Certified or registered mail service.** By mailing to address outside California (by registered or certified airmail with return receipt requested) copies to the person served. (CCP 415.40) **(Attach signed return receipt or other evidence of actual delivery to the person served.)**

f [ ] Other (Specify code section)

[ ] Additional page is attached

3 The notice to the person served (Item 2 on the copy of the summons served) was completed as follows (CCP 412.30, 415.10, and 474)

a [XX] As an individual defendant

b [ ] As the person sued under the fictitious name of

c [ ] On behalf of

Under [ ] CCP 416.10 (Corporation) [ ] CCP 416.60 (Minor) [ ] Other
[ ] CCP 416.20 (Defunct corporation) [ ] CCP 416.70 (Incompetent)
[ ] CCP 416.40 (Association or partnership) [XX] CCP 416.90 (Individual)

d [ ] By personal delivery on (Date)

4 At the time of service I was at least 18 years of age and not a party to this action.

5 Fee for service: $ 000

6 Person serving

a [XX] Not a registered California process server.

b [ ] Registered California process server.

c [ ] Employee or independent contractor of a registered California process server.

d [ ] Exempt from registration under Bus. & Prof. Code 22350(b)

e [ ] California sheriff, marshal, or constable.

f Name, address and telephone number and, if applicable, county of registration and number:

Apr 2

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on (Date) April 1[illegible], 1979 at (Place) Orange, California.

(Signature)

A declaration under penalty of perjury must be signed in California or in a state that authorizes use of such declaration in place of an affidavit, otherwise an affidavit is required.

(For California sheriff, marshal or constable use only)
I certify that the foregoing is true and correct and that this certificate is executed on (Date): at (Place) , California.

(Signature)

Form Adopted by Rule 982
Judicial Council of California
Revised Effective January 1, 1979

(See reverse for Proof of [illegible] plaintiff includes cross-complainant)

SUMMONS

415.10

BOX 113 APO 09616
NEW YORK
011963631484436269

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

LYLE H. PRENZLER, Plaintiff, v. HOMER REED, Defendant.	CIV NO. 31 12 52 REQUEST TO ENTER JUDGMENT ON AFFIDAVIT CCP 585(4)

Lyle H. Prenzler, Plaintiff herein, petitions the Court to enter Default Judgment against the Defendant Homer Reed purusant to Paragraph 585 (4) CCP, on affidavit without hearing date. Attached is required Affidavit.

Dated: July 22, 1979

LYLE H. PRENZLER IN PRO PER

AFFIDAVIT IN SUPPORT

I, Lyle H. Prenzler, declare and say that I filed a Complaint alleging breach of contract for a total of $160,000.00 and such other damages as the Court deemed just and proper; on April 16, 1979 naming Homer Reed, Defendant herein, as the cause of said damages. A default judgment was filed on July 16, 1979; and Mr. Reed has not answered the properly served Complaint under CCP 415.40, made part of the record herein.

DATED: JULY 22, 1979
NO NOTARY PUBLIC IN THIS AREA

LYLE H. PRENZLER

Court convened at 1:00 P. M. September 20 19 79 pre

Hon. ROBERT C. TODD Judge; KATHIE SIEMONS Deputy C

NONE Deputy Sheriff; NONE Repor

and the following proceedings were had:

31-12-52 PRENZLER VS REED

MOTION OF DEFENDANT, HOMER REED, TO SET ASIDE DEFAULT AND TO QUASH SERVICE OF SUMMONS AND TO DISMISS FOR THE ABSENCE OF PERSONAL JURISDICTION

Matter having been taken under submission on 9-20-79, the Court now rules. Motion to set aside default granted. Motion to quash service for lack of personal jurisdiction over defendant granted. Counsel for moving party to prepare judgment of dismissal. Clerk to give notice of ruling.

ENTERED 9-20-79

Counsel notified by mail this date.

atistical
de Use
Only

1.	2.	3.	4.	5.	6.	7.	8.	9.	10.	11.	12.	13.	14.	15.	16.

82-7.5

MINUTE ORDER

Judicial Council of California
Revised Effective July 1, 1975

OF COSTS, AND DECLARATION OF

Beets and Monagan
124 Lasky Drive
Beverly Hills, CA 90212

Attorneys for defendant
Homer Reed

Rec'd
10-19 79

SUPERIOR COURT STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

21868 2

LYLE H. PRENZLER, Plaintiff, v. HOMER J. REED, Defendant.	CIV NO. 31-12-52 ORDER AND JUDGMENT OF DISMISSAL Department: 33

On September 20, 1979, defendant Homer Reed moved in this Court to quash service of process and to dismiss for lack of personal jurisdiction. Following argument, and based upon that argument and the memorandum of points and authorities filed in support of those motions,

IT IS HEREBY ORDERED that Homer J. Reed's motion to quash service of process is hereby granted, and this action is hereby granted for lack of personal jurisdiction.

Dated: October 5, 1979.

Judge Robert C. Todd
Superior Court Judge

App 5

J. Michael Hennigan
Bretz and Hennigan
124 Lasky Drive
Beverly Hills, CA 90212

Attorneys for defendant
Homer Reed

SUPERIOR COURT STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

LYLE H. PRENZLER, Plaintiff, v. HOMER J. REED, Defendant.	CIV NO. 31-12-52 NOTICE OF DISMISSAL OF APPEAL IN RELATED CASE Department: 38

Defendant requests Judicial Notice of the attached Dismissal of Appeal in the appeal of action number 292061.

Respectfully Submitted,

BRETZ AND HENNIGAN

Not dated

By _____
J. Michael Hennigan

Acc 5

COURT OF APPEAL--STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

FILED

AUG 28 1979

ROBERT L. FORD, Clerk

Deputy Clerk

R. KEITH PIKE, ET AL
Respondents

vs.

LYLE H. PRENZLER
Appellant

4 Civ. NO. 20625

COUNTY NO. 292061

THE COURT:

The motion by respondents for an order dismissing the appeal in the above entitled cause, is GRANTED.

IT IS ORDERED that the appeal be, and hereby is DISMISSED. Respondents to recover costs on appeal.

Gardner, P.J.
Presiding Justice

C.C.
County Clerk, County of Orange, Courthouse, Santa Ana, 92701
Higgs, Fletcher & Mack, 1800 Home Tower, 707 Broadway, San Diego, 92101
Bretz & Hennigan, 124 Lasky Drive, Beverly Hills, 90212
Lyle H. Prenzler (Pro per) Northrop Peacehawk, Box 113, APO 09616, New Yor
N.Y.

COPY

J. Michael Hennigan
Bretz and Hennigan
124 Lasky Drive
Beverly Hills, California 90212
(213) 271-6201

Attorneys for defendant
Homer J. Reed

Notice to Court

SUPERIOR COURT STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

LYLE H. PRENZLER, Plaintiff, v. HOMER J. REED, Defendant.	CIV NO. 31-12-52 NOTICE OF RULING

Please take notice that on October 25, 1979, the Honorable Robert C. Todd denied plaintiff's Motion To Set Aside Judgment on the grounds of the court's prior ruling in this matter and on the basis that the plaintiff had apparently filed a Notice Of Appeal which would operate to deprive the Superior Court of jurisdiction over this matter.

A.P.
(6)

Respectfully submitted,
Bretz and Hennigan

By: _____
J. Michael Hennigan

Attorneys for defendant
Homer J. Reed

COURT OF APPEAL—STATE OF CALIFORNIA

COURT OF APPEAL - FOURTH DIST.
FILED
FEB 13 1980
ROBERT L. FORD, Clerk
Deputy Clerk

FOURTH APPELLATE DISTRICT

DIVISION TWO

LYLE H. PRENZLER,
Appellant,
vs.
HOMER REED,
Respondent.

4 Civil NO. 21868

Orange COUNTY NO. 311252

THE COURT:

The petition to set aside order of dismissal, petition for relief from default, and request for extension of time to file designation of record on appeal are DENIED.

McDaniel, J.
Acting Presiding Justice

C.C.
Orange County Clerk, 700 Civic Center Dr.West,Santa Ana,Ca. 92701
✓Lyle H. Prenzler, 715 E.Chapman Ave.,Orange,Ca. 92666
Bretz & Hennigan, 124 Lasky Dr.,Beverly Hills,Ca. 90212

COPY

LYLE H. PRENZLER
715 East Chapman Avenue
Orange, California 92666
714 639 1701

COURT OF APPEALS STATE OF CALIFORNIA DISTRICT FOURT

LYLE H. PRENZLER,
Plaintiff Appellant,
vs.
HOMER REED,
Defendant, Appellee.

CASE NO. 21868
ORANGE COUNTY 311252
NOTICE OF APPEAL

LYLE H. PRENZLER, appellant, hereby appeals the Order of April 24, 1980, in the above causes to the Supreme Court of the United States, denying Petition for Hearing in the Supreme Court of the State of California, for denial of equal protection of the laws, under cover of state statute, repugnancy to Constitution, and conspiracy by a class of co-conspirators to deny this appellant right to equal civil rights in natureof injunctive relief.

Dated: April 28, 1980

Respectfully submitted,

LYLE H. PRENZLER PRO SE
APPELLANT

Article 2

INCONVENIENT FORUM

Sec.
410.30 Stay or dismissal of action; general appearance.

Article 2 was added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.

§ 410.30 Stay or dismissal of action; general appearance

(a) When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.

(b) The provisions of Section 418.10 do not apply to a motion to stay or dismiss the action by a defendant who has made a general appearance.

(Added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970. Amended by Stats.1972, c. 601, p. —, § 1.)

Comment—Judicial Council

Section 410.30 gives statutory recognition to the doctrine of *forum non conveniens*, which authorizes a court to decline to exercise its jurisdiction in appropriate instances on the ground that the plaintiff has unfairly or unreasonably invoked the jurisdiction of an inconvenient forum.

Inconvenient Forum

The various bases of judicial jurisdiction recognized under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution establish the outermost limits beyond which a state court may not exercise its judicial jurisdiction. Within those limits, the owner of a transitory cause of action will often have a wide choice of forums in which to bring his action. Some of these forums may have little relation either to the parties or to the cause of action and suit in them may increase greatly the burden to the defendant of making a defense. Under the doctrine of inconvenient forum, a court, even though it has jurisdiction, will not entertain the suit if it believes that the forum of filing is a seriously inconvenient forum for the trial of the action. But in such instances a more appropriate forum must be available to the plaintiff. For illustrative cases, see Gulf Oil Corp. v. Gilbert (1947) 330 U.S. 501, 508, 67 S.Ct. 839, 842; Thomson v. Continental Ins. Co. (1967) 66 Cal.2d 738, 742, 59 Cal.Rptr. 101, 427 P.2d 765 (application of inconvenient forum doctrine is extremely limited where the plaintiff is a bona fide resident of the forum state); Goodwine v. Su-

domicil of plaintiff in ... a defendant's motion for dismissal); Price v. Atchison, T. & S. F. Ry. Co. (1954) 42 Cal.2d 577, 583, 268 P.2d 457, 43 A.L.R.2d 756 (nonresident plaintiff). See also RESTATEMENT (SECOND), CONFLICT OF LAWS, § 84 (Proposed Official Draft, Part I, Ch. 4, 1967); UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.05; Wis.Stat.Ann. Tit. 25, § 262.19; and Norwood v. Kirkpatrick (1955) 349 U.S. 29, 75 S.Ct. 544, 546, 99 L.Ed. 789 (broader discretion in federal courts by reason of their statutory authority to transfer actions between federal courts); Barrett, The Doctrine of Forum Non Conveniens (1949) 35 Cal.L. Rev. 380, 421; 41 Cal.L.Rev. 507; 42 Cal.L.Rev. 690; Ehrenzweig, Conflict of Laws (1962) 120–137; Goodrich, Conflict of Laws (Scoles, 4th ed. 1964) 16; Braucher, The Inconvenient Federal Forum (1947) 60 Harv.L.Rev. 908; 71 Harv.L.Rev. 732; 73 Harv.L. Rev. 1008; 10 Hastings L.J. 142; 25 So.Cal.L.Rev. 193; 20 Stan.L. Rev. 57 (convenient forum abroad); 3 U.C.L.A.L.Rev. 102, 399 (federal inconvenient forum); 48 A.L.R.2d 800 (out-of-state non-statutory torts); 48 A.L.R.2d 850 (foreign wrongful death statutes); 90 A.L.R.2d 1109 (contract actions); 9 A.L.R.3d 545 (matrimonial disputes).

The Uniform Interstate and International Procedure Act, which embodies material taken from Title 25, Section 262.19, of the Wisconsin inconvenient forum statute, sets forth in its comment to Section 1.05 the following four factors to be considered by a court on the issue of inconvenient forum:

1. The amenability of the parties to personal jurisdiction in this state and in any alternative forum.

2. The convenience to the parties and witnesses of trial in this state and in any alternative forum.

3. The differences in conflict of law rules applicable in this state and in any alternative forum.

4. Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

More particularly, a court should weigh the following factors:

1. Where the residence or the principal place of business of each party is located.

2. Whether some or all of the parties regularly conduct business or other activities in this state.

3. Whether the situation, transaction or events out of which the action arose exists, occurred in, or had a substantial relationship to this state.

4. Whether any party would be substantially disadvantaged in having to try the action (a) in this state or (b) in the forum in which the moving party asserts it ought to be tried.

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4. Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

More particularly, a court should weigh the following factors:

1. Where the residence or the principal place of business of each party is located.

2. Whether some or all of the parties regularly conduct business or other activities in this state.

3. Whether the situation, transaction or events out of which the action arose exists, occurred in, or had a substantial relationship to this state.

4. Whether any party would be substantially disadvantaged in having to try the action (a) in this state or (b) in the forum in which the moving party asserts it ought to be tried.

Plaintiff's attorney is not "party to action" and is competent to serve summons. Sheehan v. All Persons, etc. (1927) 202 P. 237, 85 C.A. 393.

Though such authority is not conferred by statute, the court, by virtue of its original jurisdiction, has the power to appoint a special officer to execute its process. Wilson v. Roach (1851) 4 C. 362.

5. Effect of service by party

If husband seeking divorce had filed affidavit to effect that he personally had served the summons and complaint rather than that daughter of the parties had done so, wife's default could not have been entered, in view of this section providing that a summons may not be served by a party to the action. Sullivan v. Sullivan (1967) 64 Cal.Rptr. 82, 256 C.A.2d 361.

Under this section, husband's service of summons and complaint on wife in his divorce action was void although daughter of the parties witnessed service and was capable of making it and although she signed affidavit of service. Id.

6. Receipt of papers

Superior court did not acquire jurisdiction over person of wife from whom husband sought divorce and on whom he invalidly served summons and complaint, although she actually received the papers. Sullivan v. Sullivan (1967) 64 Cal.Rptr. 82, 256 C.A.2d 361.

A decree in foreclosure taken by default, and a sale thereunder, where actual service was made on defendants, and the record shows on its face that it was by one having authority, were not invalid because the summons was in fact served by one without authority, until reversed or set aside. Bank of Orland v. Dodson (1899) 59 P. 584, 127 C. 208, 78 Am.St.R. 42.

§ 415. Repealed by Stats.1969, c. 1610, p. 3373, § 16, operative July 1, 1970

Historical Note

The repealed section, enacted in 1872, amended by Stats.1933, c. 744, p. 1847, § 21, derived from Stats.1851, c. 5, p. 56, §§ 33, 34, related to proof of service of summons. See, now, § 417.10.

The repealed section was amended by the 1931 revision act, Stats.1931, c. 161, p. 331, § 65. However, on the authority of Lewis v. Dunne (1901) 66 P. 478, 134 C. 291, 55 L.R.A. 833, 86 Am.St.R. 257, the 1901 revision act was unconstitutional and void.

Operative date and effect of act on pending proceedings, see Historical Note under § 416.16.

Article 3

MANNER OF SERVICE OF SUMMONS

Sec.

415.10 Personal delivery of copy of summons and complaint.
415.20 Leaving copy of summons and complaint at office, dwelling house, usual place of abode or usual place of business; mailing copy.
415.30 Service by mail.
415.40 Service on person outside state.
415.45 Unlawful detainer; commercial property; service by posting; conditions.
415.50 Service by publication.
416 to 416.3 Repealed.

Article 3 was added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.

Law Review Commentaries

Legislative changes in service of process. (1969) 10 Santa Clara L. 192.

Library References

Process ⊂=64. C.J.S. Process §§ 34, 36.

§ 415.10 Personal delivery of copy of summons and complaint

A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery.

(Added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.)

Comment—Judicial Council

Methods that must be used in an attempt to deliver a copy of the summons and of the complaint to the person or persons to be served are specified in the various sections in this article. In addition, service may be effected by any method authorized by another statute of this state and, when authorized by Section 413.10, by a method specified in a foreign law.

Five separate methods are specified in this article: (1) The traditional method of personal delivery (Section 415.10). (2) Delivery of process to a specified person usually at a defendant's abode or place of business (Section 415.20). (3) Delivery of process by ordinary first-class mail or airmail with return acknowledgement of receipt (Section 415.30). (4) Delivery of process by registered or certified airmail with return receipt (Section 415.40). (5) Service by publication (Section 415.50). Except for delivery by registered or certified mail, these methods may be used to effectuate service either within or outside this state. (Section 413.10.) Service by registered or certified airmail may be used to effectuate service only on a person outside this state. (Section 415.40.)

The persons who are eligible to make such service are specified in Section 414.10, and the persons who are eligible to receive such service are specified in Article 4 (Sections 416.10 through 416.90). Proof of service is governed by Article 5 (Sections 417.10 through 417.30).

Section 415.10 continues the law dealing with hand delivery of process, and declares that such service is complete upon delivery of process to the person or persons to be served. The time within which a defendant must file his responsive pleading is

Note 8

have already vested. Newhall v. Provost (1926) 6 C. 85.

9. Loss of summons after service

If a summons has in fact been served, jurisdiction of the person of the defendant has been secured even though the original is lost after service. Pacific Mutual Life Ins. Co. v. Bugbey (1874) 1 C.U. 871.

12. Return of service as evidence

Unsupported denial by ward after restoration to competency that she had received notice of guardianship proceedings could not overcome presumption of regularity and positive assertions contained in sheriff's return showing that incompetent had been properly served. In re Barker's Guardianship (1950) 223 P.2d 64, 100 C.A.2d 69.

A "return" is the evidence by which the court is informed that the defendant has been given notice to appear in court. Frohman v. Bonelli (1949) 204 P.2d 650, 91 C.A.2d 295.

Certified copy of the summons and return showing personal service upon defendants at a specified time and place together with testimony of process server as to the service and identifying defendants as the persons served was sufficient proof of service of process to establish jurisdiction of justice's court over persons of defendants. Crenshaw v. Smith (1946) 168 P.2d 733, 76 C.A.2d 255.

In justice's court suit, officer's return, showing service of process on defendant in township wherein court is located, is prima facie evidence of defendant's residence therein. Schuler-Knox Co. v. Smith (1944) 141 P.2d 47, 62 C.A.2d 86.

In an action against a company, the return of a sheriff on the summons that he had served it on one P., one of the partners and associates of the company, is prima facie evidence that P. was such partner and associate. Wilson v. Spring Hill Quartz Min. Co. (1858) 10 C. 445.

The officer's return on the summons is evidence of the service. Denmark v. Liening (1858) 10 C. 93.

11. Presumptions

In suit to quiet title to land acquired by defendant in partition and purchased by plaintiff at sheriff's sale, in view of recitals of service in partition suit, it will be presumed that defendant was personally served in such suit, and that judgment is binding upon him, although naming him as "Klaney" instead of "Kenney." Bank of Commerce & Trust Co. v. Kenney (1917) 165 P. 8, 175 C. 59.

Where the affidavit of service of summons is defective, it will be presumed in support of a judgment based thereon that the court received other evidence which established that service was properly made. Welsh v. Koch (1907) 88 P. 604, 4 C.A. 571.

Where summons was served by publication after the original summons was returned, it would be presumed, in the absence of anything appearing to the contrary on the face of the record, that an alias summons was issued. Boyer v. Pacific Mut. Life Ins. Co. (1960) 81 P. 671, 1 C.A. 94.

Where the return of a sheriff states that he served defendant with a certified copy of the complaint, the clerk being the only one allowed to certify such copies, it will be presumed that the certification was by him. Curtis v. Herrick (1859) 14 C. 117, 73 Am.Dec. 632.

§ 417.40 Proof of service signed by registered process server; additional contents

Any proof of service which is signed by a person registered under Chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code or his employee or independent contractor shall indicate the county in which he is registered and the number assigned to him pursuant to Section 22355 of the Business and Professions Code.

(Added by Stats.1971, c. 1661, p. 3578, § 3, operative July 1, 1972.)

Cross References

Applicability of procedural provisions to all trial courts, exceptions, see § 34.

Applicability of section to collect, applicability of this section, see Business and Pro-

Law Review Commentaries

Legislative changes in service of process. (1969) 10 Santa Clara L. 192.

Service of process. (1956) 29 So.Cal.L.R. 103.

Library References

Process ⇐149. C.J.S. Process § 102.

§ 418. Unconstitutional

Historical Note

Section 418 was added by the 1901 revision act, Stats.1901, c. 102, p. 122, § 2. However, on the authority of Lewis v. Dunne (1901) 66 P. 678, 134 C. 291, 55 L.R.A. 672, 86 Am.St.R. 257, the 1901 revision act was unconstitutional and void.

Chapter 5

OBJECTION TO JURISDICTION

Sec.

418.10 Motion to quash service of summons or to stay or dismiss action; procedure.

Chapter 5 was added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.

§ 418.10 Motion to quash service of summons or to stay or dismiss action; procedure

(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him.

(2) To stay or dismiss the action on the ground of inconvenient forum.

(b) Such notice shall designate, as the time for making the motion, a date not less than 10 nor more than 20 days after filing of the notice. The service and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him of a written notice of entry of an order denying his motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days.

(c) If such motion is denied by the trial court, the defendant, within 10 days after service upon him of a written notice of entry of an order of the court denying his motion, or within such further time not exceeding 20 days as the trial court may for good cause allow,

and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action. The defendant shall file or enter h[illegible] responsive pleading in the trial court within the time prescribed by subdivision (b) unless, on or before the last day of his time to plead, he serves upon the adverse party and files with the trial court a notice that he has petitioned for such writ of mandate. The service and filing of such notice shall extend his time to plead until 10 days after service upon him of a written notice of the final judgment in the mandate proceeding. Such time to plead may for good cause shown be extended by the trial court for an additional period not exceeding 20 days.

(d) No default may be entered against the defendant before expiration of his time to plead, and no motion under this section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant.

(Added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.)

Comment—Judicial Council

Section 418.10 continues the law that permits a defendant, or in appropriate cases a cross-defendant, who desires to challenge the jurisdiction of the court and to raise certain defenses, to make a special appearance for such purposes, without submitting to the jurisdiction of the court. (Subdivision (a).) At the same time, Section 418.10 also permits him to object on inconvenient forum grounds to the court's exercising its jurisdiction over him if his challenge to jurisdiction should be denied.

The defendant or cross-defendant, on or before the last day on which he is required to file a responsive pleading to the complaint (usually 30 days from date of completed service), or within such additional time as the court may for good cause allow, must serve and file a notice that he will present in court, on a date not less than 10 days nor more than 20 days after filing the notice, a motion to quash the summons or other process and/or to stay or dismiss the action. (Subdivisions (a) and (b).) Service and filing of this notice extends the defendant's or cross-defendant's time to plead until 10 days after service of written notice of the trial court's denial of his motion. But this period may be extended by the court for good cause shown for an additional 20 days. During the period of the extension no default may be entered against him. (Subdivision (d).) If the court grants the motion, no responsive pleading or extension is, of course, needed, since the service of summons is quashed or the action is stayed or dismissed.

[illegible] permitted to join with such motion a motion to quash service of process on the ground of lack of jurisdiction over the defendant or cross-defendant, or to stay or dismiss the action on the ground of inconvenient forum, or to strike out all or any part of the complaint or cross-complaint, or to dismiss the complaint or cross-complaint, or any cause of action therein asserted, for failure to state facts sufficient to constitute a cause of action. (Subdivision (c).) Under former law, a motion to quash service of process was not permitted to be joined with a motion to vacate a default or default judgment. (Subdivision (b); 43 Cal.L.Rev. 695, 699.) Neither of these motions, when made with a motion under this section, is deemed a general appearance by the defendant.

If his motion is made and denied by the trial court, the defendant must plead to the complaint or cross-complaint within the period of extension (15 days and any additional time granted by the court up to a total of 35 days after service of written notice of the order of denial), unless he elects to petition an appropriate reviewing court for a writ of mandate to require the trial court to enter an order quashing the service of summons or staying or dismissing the action. (Subdivision (c); see Armstrong v. Superior Court (1956) 144 Cal.App.2d 420, 430, 301 P.2d 51; 43 Cal.L.Rev. 695; 29 So.Cal.L.Rev. 98.) Upon serving and filing a notice in the trial court that he has petitioned for such writ of mandate, the defendant or cross-defendant is given a second extension of time to plead: until 10 days after written notice of final judgment of denial in the mandate proceeding, with a permissible added extension for good cause shown of up to a total of 30 days. (Subdivision (c).) No default may, again, be entered against the defendant until expiration of his time to plead. (Subdivision (d).)

The ground for granting a motion to quash service of process on a defendant, or in appropriate cases a cross-defendant, is that the court lacks jurisdiction over him because either there is no basis of judicial jurisdiction existing between such defendant and this state (see Section 410.10) or no authorized method of service was properly used in an attempt to give such defendant actual notice of the action (see Section 413.10), and such defendant has not made a general appearance in the action (Section 410.50). In accordance with the former law, the court, in the absence of a general appearance by the defendant, may also quash service of process where service was effectuated by force or fraud or where the person served was entitled to an immunity from service of process. (See, *e. g.*, comment to Section 410.10, Bases of Judicial Jurisdiction Over Individuals, (1) Presence.) The grounds and conditions for granting a motion to stay or dismiss an action for inconvenient forum reasons are discussed in the comment to Section 410.30.

Historical Note

Operative date and effect of act on pending proceedings, see Historical Note under § 410.10.

Derivation: Former sections 416.1 to 416.3 added by Stats.1945, c. 1427, pp. 2539, 2540, §§ 1 to 3, amended by Stats.1963, c. 878, p. 2125, § 1.

Cross References

Applicability of procedural provisions to all trial courts, except as, see § 36.
Inconvenient forum, see § 410.30.
Motion to quash summons in proceeding under Family Law Act, see California Rules of Court, Rule 1234.

Note 43

In suit for personal injuries, where no evidence was introduced in support of cause of action for damage to motorcycle, and same was dismissed before case was submitted, defendant could not be prejudiced by overruling of his demurrer, although causes of action were improperly joined under this section. Logan v. Lewis (1918) 179 P. 821, 35 C.A. 673.

Where a party, entitled to bring a single action to recover a specified sum, brought two actions therefor, and defendant made no objection thereto and the judgments rendered in the two actions were correct in amount and within the limits of the liability of defendant, the judgments would not be disturbed. J. F. Hall-Martin Co. v. Hughes (1912) 122 P. 617, 18 C.A. 512.

Where a cause of action for breach of contract in one count was improperly joined with another count on a cause of action founded on tort, prejudice would be presumed since such joinder was expressly forbidden by this section, and it did not affirmatively appear that no injury was done thereby. Stark v. Wellman (1852) 31 P. 229, 96 C. 630.

Whether or not a cause of action to quiet title was improperly joined with one against a trustee of real estate having no beneficial interest, if the plaintiff was entitled to a conveyance from the trustee, and the trustee could have recovered from the other defendant in the cause of action to quiet title, the substantial rights of the parties were not affected, and judgment would not be reversed for such error. Reynolds v. Lincoln (1886) 12 P. 449, 71 C. 123.

Article 4

CROSS-COMPLAINTS

Sec.

428.10 Filing of cross-complaint; causes of action.
428.20 Joinder of person as cross-party.
428.30 Joinder of other causes of action by cross-complaint.
428.40 Separate document.
428.50 Filing of cross-complaint; leave of court.
428.60 Service; appearance.
428.70 Definitions.
428.80 Abolition of counterclaims.

Article 4 was added by Stats.1971, c. 244, p. 380, § 23, operative July 1, 1972.

Historical Note

Operative date of 1971 addition and applicability of Article 4 to actions commenced on or after July 1, 1972, see, Historical Note under § 117h.

§ 428.10 Filing of cross-complaint; causes of action

A party against whom a cause of action has been asserted in a complaint or cross-complaint may file a cross-complaint setting forth either or both of the following:

(a) Any cause of action he has against any of the parties who filed the complaint or cross-complaint against him. Nothing in this subdivision authorizes the filing of a cross-complaint against the plaintiff in an action commenced under Title 7 (commencing with Section 1237) of Part 3.

(b) Any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against him.

(Added by Stats.1971, c. 244, p. 380, § 23, operative July 1, 1972.)

Legislative Committee Comment—Assembly

1971 Addition

Section 428.10 reflects the fact that a cross-complaint is the only type of pleading that may be filed to request relief by a party against whom a complaint or cross-complaint has been filed. It should be noted that, if the cause arises out of the same transaction or occurrence, the cross-complaint is compulsory. See Section 426.30. Counterclaims have been abolished. Section 428.80.

Subdivision (a) adopts the simple rule that a party against whom a complaint or cross-complaint has been filed may bring any cause of action he has (regardless of its nature) against the party who filed the complaint or cross-complaint. There need be no factual relationship between his cause and the cause of the other party. This is the rule under the Federal Rules of Civil Procedure and other modern provisions. *E. g.*, Fed.R.Civ.Proc. Rule 13. Third persons may be joined pursuant to Section 428.20.

Subdivision (b) does not, of course, limit the right of a party against whom a cause of action has been asserted to join unrelated causes of action when filing a cross-complaint under subdivision (a) against the party who asserted the cause against him. Subdivisions (a) and (b) are completely independent provisions, and it is necessary only that the person seeking to file the cross-complaint come within the provisions of one of the subdivisions.

Subdivision (a) is generally consistent with prior law (former Code of Civil Procedure Section 438) which provided for a counterclaim; but, under prior law, some causes which a party had against an opposing party did not qualify as counterclaims because they did not satisfy the "diminish or defeat" or "several judgment" requirements. These requirements are not continued, and subdivision (a) permits unlimited scope to a cross-complaint against an opposing party. For discussion of the prior law, see the Comment to Section 426.30 and Friedenthal, Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 Stan.L.Rev. 1, 19–23 (1970).

Subdivision (b) continues the rule (former Code of Civil Procedure Section 442) that a cross-complaint may be asserted against any person, whether or not a party to the action, if the cause of action asserted in the cross-complaint arises out of the same transaction or occurrence or involves the same property or controversy (see, discussion in Comments to sections 378, 379, and 426.10). Subdivision (b) thus permits a party to assert a cause of action against a person who is not already a party to the action if the cause has a subject matter connection with the cause already asserted in the action. For further discussion, see Friedenthal, *supra*, at 25–26.

Section 428.10 restricts cross-complaints in eminent domain actions to those that assert a cause of action arising out of the same transaction or occurrence or that involve the same property or controversy. Subdivision (a) which permits assertion of unrelated causes of action is made specifically inapplicable to eminent domain actions; but subdivision (b), which permits assertion of related causes, is applicable.

Any undesirable effects that might result from joinder of causes under Section 428.10 may be avoided by severance of causes or issues for trial under Section 1048 of the Code of Civil Procedure.

Historical Note

Derivation: Former section 427, enacted 1872, amended by Stats.1907, c. 372, p. 705, § 2; Stats.1913, c. 135, p. 219, § 1; Stats.1915, c. 29, p. 30, § 1; Stats.1933, c. 224, p. 356, § 1; Stats.1951, c. 589, p. 1736, § 8.

Former section 438, enacted 1872, amended by Stats.1927, c. 813, p. 1620, § 1.

Former section 441, enacted 1872.

Former section 442, added by Code Am. 1873–74, c. 383, p. 301, § 54, amended by Stats.1907, c. 372, p. 706, § 6; Stats.1909, c. 629, p. 966, § 1; Stats.1915, c. 141, p. 298, § 1; Stats.1933, c. 275, p. 756, § 1.

Stats.1851, c. 5, pp. 57 to 59, §§ 47, 49, 64; Stats.1855, c. 166, p. 195; Stats.1860, c. 314, p. 294.

Cross References

Applicability of procedural provisions to all trial courts, exceptions, see § 34.
Cross-complaint beyond jurisdiction, transfer of case, see § 398.
Cross-demands, see § 431.70.
Dismissal where there is a cross-complaint, see § 581.
Divorce, residence of cross-complainant, see Civil Code § 4530.
Effect of failure to set up cross-complaint, see § 426.30.
Judgment on cross-complaint exceeding plaintiff's demand, see § 666.
Justice court, cross-complaint in, see § 422.20.
New matter in answer deemed controverted, see § 431.20.
Permitted pleadings, see § 422.10.
Requisites of original complaint, see § 422.30 et seq.
Trial of special defenses pleaded in answer to cross-complaint, see § 597.

Law Review Commentaries

Action by third party beneficiary: right of promisor to set-off or counterclaim demands against the promisee. (1935) 27 C.L.R. 497, 525.

Appealability of order striking cross-complaint. (1962) 15 Hastings L.J. 111.

Automatic setoff of cross demands under statute. (1964) 42 C.L.R. 897.

Bank's right to setoff against a debt secured by realty—is it a bird in the hand or a bird in the bush? Robert J. Breakstone (1969) 44 Los Angeles Bar Bull. 249.

Bank's right to set-off against a secured loan of a depositor. (1947) 35 C.L.R. 116.

Banks, set-off of deposits. (1923) 11 C.L.R. 111, 113.

Comment on nature of cross-actions. (1934) 22 C.L.R. 695.

Comparison of the cross-complaint and the counterclaim in California. (1950) 3 Stan.L.R. 99.

Compensatio: Automatic extinction of cross-demands. (1965) 53 C.L.R. 224.

Counterclaim: filing against non-resident. 4 U.C.L.A.Law Rev. 271. (1957).

Counterclaims, cross-complaints, and confusion. (1950) 3 Stanford L.R. 99.

Counterclaim and cross-complaint compared and contrasted. (1937) 10 So.Cal. L.R. 416.

Counterclaims for personal injury and property damage resulting from a single act. (1934) 23 C.L.R. 161.

Courts having jurisdiction of cross-demands. (1941) 29 C.L.R. 765.

Cross-demands: California procedure and the Federal Rules. (1954) 1 U.C.L.A. Law R. 547.

Demurrer to cross-complaint. (1939) 13 So.Cal.L.R. 6.

Distinctions between and overlapping of counterclaims and cross-complaints. (1950) 3 Stan.L.R. 99.

Effect of a statute of limitations upon the right to assert a counterclaim. (1943) 31 C.L.R. 210.

Equitable defenses in law actions in federal courts. (1929) 17 C.L.R. 591.

Ex parte matters relating to the pleadings. Clinton Rodda (1965) 41 Los Angeles Bar Bull. 27.

Joinder of actions with special reference to the Montana and California practice. (1930) 18 C.L.R. 459.

Judgments subject to set-off. (1922) 10 C.L.R. 422, 424.

Necessity of cross-complaint and effect of unnecessary cross-complaint. (1913) 2 C.L.R. 82.

Problems encountered in permitting excessive attachment victim to recover in cross-action for abuse of process, as opposed to separate, subsequent action for malicious prosecution. (Fall 1968) 9 Santa Clara Lawyer 132.

Proceeding on a cross-pleading after dismissal of plaintiff's action. (1952) 25 So. Cal.L.R. 226.

Relationship between counterclaim and set-off to foreclosure of a mortgage are discussed in (1937) 25 C.L.R. 347.

Res judicata; counterclaims, cross-claims and failure to set up counterclaim. (1952) 40 C.L.R. 412, 423.

Right to assert counterclaims for personal injuries and property damage resulting from a single act. (1934) 22 C.L.R. 161.

Scope of statutory provisions for pleading counterclaims. (1928) 16 C.L.R. 363, 365.

Set-off against insolvent bank. (1933) 6 So.Cal.L.R. 233.

Set-off and counterclaim in mortgage foreclosure action. (1937) 25 C.L.R. 347, 352.

Suggested revision of California provisions as to joinder of claims, counterclaims, and cross-complaints. Jack H. Friedenthal (1970) 23 Stan.L.R. 1.

Tendency to diminish or defeat plaintiff's recovery as basis for counterclaim. (1930) 18 C.L.R. 459, 479.

Transactional cross-complaints. William A. Masterson (1963) 35 Los Angeles Bar Bull. 249.

Waiver by a bank of a right to set-off garnished deposit against depositor's indebtedness. (1937) 26 C.L.R. 145.

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Pleading ⇨128.
C.J.S. Pleading § 167.
Recommendation and study relating to counterclaims and cross-complaints, joinder of causes of action, and related provisions. 10 Cal.L.Revision Comm. Reports 501 (1971); Report of Senate Committee on Judiciary on Senate Bill 201, S. Journal, April 1, 1971; Communication From Assembly Committee on Judiciary on Senate Bill 201, A. Journal, June 16, 1971.

Note 4

party's presence. Atherley v. MacDonald, Young & Nelson, Inc. (1955) 287 P.2d 529, 135 C.A.2d 313.

Under proper circumstances, relief may be sought by the filing of a cross-complaint in a claim and delivery action, and new parties may be brought in under a cross-complaint where it appears that their presence is essential to the complete determination of the controversy already before the court. Spencer Kennelly, Limited, v. Bank of America Nat. Trust & Sav. Ass'n (1942) 122 P.2d 552, 19 C.2d 556.

A new party not necessary to the decision of the matter before the court could not be brought into a case by a cross-complaint authorized by former § 442. Reed v. Wing (1914) 144 P. 364, 165 C. 706.

Under former § 442, a defendant could not introduce new parties by way of cross-complaint. Clark v. Kelley (1912) 124 P. 446, 163 C. 207.

Under former § 442, defendant properly could join third person with plaintiff as a party defendant to the cross-complaint. Goodell v. Verdugo Cañon Water Co. (1903) 71 P. 351, 138 C. 305.

New parties may be brought in by defendant on a cross bill, if the cause of action to which they are made parties defendant is the proper subject of a cross complaint. Stockton Savings & Loan Soc. v. Harrold (1900) 60 P. 165, 127 C. 612.

§ 428.30 Joinder of other causes of action by cross-complainant

Where a person files a cross-complaint as authorized by Section 428.10, he may unite with the cause of action asserted in the cross-complaint any other causes of action he has against any of the cross-defendants, other than the plaintiff in an eminent domain proceeding, whether or not such cross-defendant is already a party to the action.

(Added by Stats.1971, c. 244, p. 381, § 23, operative July 1, 1972.)

Legislative Committee Comment—Assembly

1971 Addition

Section 428.30 provides permissive joinder rules that treat a cross-complaint generally the same as a complaint in an independent action. *Cf.* Section 427.10. Thus, with a single exception, if a party files a cross-complaint against either an original party or a stranger or both, he may assert in his cross-complaint any additional causes of action he has against any of the cross-defendants. See the Comment to Section 427.10. The exception is the filing of a cross-complaint against the plaintiff in an eminent domain action. In such a case, the cross-complaint may state only those causes of action which arise out of the same transaction or occurrence or involve the same property or controversy. See Section 428.10. Any undesirable effects that might result from joinder of causes under Section 428.30 may be avoided by severance of causes or issues for trial under Section 1048.

Law Review Commentaries

Comparison of the cross-complaint and the counterclaim in California. (1950) 1 Stan.L.R. 99.

Courts having jurisdiction of cross-demands. (1941) 29 C.L.R. 765.

Cross-demands: California procedure and the Federal Rules. (1954) 1 U.C.L.A. Law R. 547.

Library References

§ 428.40 Separate document

The cross-complaint shall be a separate document.

(Added by Stats.1971, c. 244, p. 381, § 23, operative July 1, 1972.)

Law Revision Commission Comment

1971 Addition

Section 428.40 requires the cross-complaint to be a separate document. Under prior practice, a counterclaim could be a part of the answer. However, the counterclaim is now abolished. See Section 428.80.

Law Review Commentaries

Counterclaims, cross-complaints, and confusion. (1950) 2 Stanford L.R. 99.

Cross-demands: California procedure and Federal Rules. (1954) 1 U.C.L.A. Law R. 547.

Library References

Pleading ⇐147.

C.J.S. Pleading § 174.

Notes of Decisions

1. In general

Cross-complaint is pleading separate and apart from answer, and is required to be complete and sufficient in itself, and cannot be aided by averments of answer. Luse v. Peters (1924) 28 P.2d 357, 219 C. 625.

§ 428.50 Filing of cross-complaint; leave of court

A party shall obtain leave of court to file any cross-complaint except one filed before or at the same time as his answer to the complaint or cross-complaint. Such leave may be granted in the interest of justice at any time during the course of the action.

(Added by Stats.1971, c. 244, p. 381, § 23, operative July 1, 1972.)

Legislative Committee Comment—Senate

1971 Addition

The first sentence of Section 428.50 continues the substance of a portion of former Code of Civil Procedure Section 442 except that it makes clear that a cross-complaint may be filed "before" as well as at the same time as the answer. As under former Section 442, permission of the court is required to file a cross-complaint subsequent to the answer. The language "may be granted" of Section 428.50 places the question of leave to file a cross-complaint after the answer wholly in the discretion of the court; it is to be distinguished from the mandatory language "shall grant" of Section 426.50 relating to compulsory cross-complaints.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

[illegible]

I have this day filed Order

HEARING DENIED

In re: 4/cv. *No.* 21868
Prenzler

vs.

Reed.

Respectfully,

G. E. BISHEL
Clerk

[illegible]